ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

To: The Commission

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

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SUMMARY

In these comments, Vanguard describes basic principles the Commission should use in implementing new Sections 251 and 252 of the Communications Act. Although many of these principles apply equally to wireless and landline providers, Vanguard has derived them in light of its experiences as a cellular carrier, which span more than a decade. Consequently, Vanguard submits that the Commission should follow these principles when crafting its rules in this proceeding:

- Uniform national rules should be adopted to prevent states from creating a series of inconsistent regulatory models.
- CMRS providers should not be subjected to regulation under Section 251(b), either for interconnection or by being treated as LECs for regulatory purposes.
- The terms and conditions of reciprocal transport and termination must be designed to promote competition by imposing minimum costs and by requiring that the broadest possible range of technical interconnection options be made available.
- All telecommunications carriers, including CMRS providers, must have access to unbundled elements of the incumbent LEC network on terms and conditions that drive the charges for those elements down to cost.
- Rules to govern state proceedings under Section 252 are necessary to prevent unreasonable outcomes and encourage good faith negotiation.

Consistent with these guidelines, there are certain specific steps the Commission should take. The Commission should reaffirm its original commitment to acting on CMRS interconnection in the pending proceeding on that subject, and should act quickly. The Commission should adopt specific pricing boundaries for compensation for reciprocal transport and termination, using the Congressionally-endorsed "bill and keep" method as one bound and long run incremental cost as the other. Similarly, the Commission should adopt rules that assure that unbundled elements of the incumbent LEC network are available to all

telecommunications carriers at cost-based rates. The Commission should not use its power to treat CMRS providers as LECs at this time, and instead should wait until CMRS becomes a meaningful substitute for local exchange service.

The Commission also must adopt specific rules to govern state proceedings under Section 252. These rules should require existing interconnection agreements to be judged under the standards applicable to arbitrations, not the general "public interest" standard for freely-negotiated agreements. The rules also should require the results of arbitrations to conform to the national rules the Commission adopts Finally, the Commission should adopt rules to govern state consideration of requests by rural carriers for exemption from their obligations as incumbent LECs that put the burden of proof on the rural carrier, not on the state commission or on other parties.

The Commission should follow the guidelines described above by adopting the specific proposals in these comments. Doing so will implement the intent of Congress to promote competition and to apply different requirements to different types of carriers. The Commission should focus on the Congressional intent to create a national framework that would encourage the growth of competition without unduly burdening carriers that lack market power, including new competitors and CMRS providers. If it does so, it will achieve the underlying goals of the 1996 Act, to the benefit of consumers and competitors alike.

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Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits its comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-referenced proceeding.[1/]

I. INTRODUCTION

Key points:

- Vanguard has a significant interest in the outcome of this proceeding.
- Because this proceeding is crucial to the development of local telephone competition, the Commission should adopt specific, enforceable national rules governing both substantive obligations and procedures under Sections 251 and 252.
- The Commission should not treat CMRS providers as LECs, either by shoehorning CMRS interconnection into the provisions of Section 251(b) or by applying LEC regulatory obligations to CMRS providers

Vanguard is a long-time provider of cellular service, and currently serves more than 400,000 customers. Vanguard entered the cellular marketplace in 1984 and now is one of the 20 largest cellular carriers in the country. Vanguard's cellular systems serve 28 markets

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1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, CC Docket No. 96-86, rel. Apr. 19, 1996 (the "*Notice*").

in the eastern half of the United States and cover a geographic area containing more than 7.5 million people.

Vanguard has been an active participant in the Commission's recent proceedings to implement the Telecommunications Act of 1996.[2/] The Company has participated in the rulemakings on BOC out-of-region safeguards, interexchange services and universal service.[3/] Vanguard also participated in the Commission's proceeding regarding the terms and conditions governing interconnection between commercial mobile radio service ("CMRS") providers and local exchange carriers ("LECs").[4/]

This rulemaking, however, is the most important proceeding the Commission will undertake as it implements the 1996 Act. Through this proceeding, the Commission will set basic ground rules for the development of competition in local telephone markets under new Sections 251, 252 and 253 of the Communications Act. While many of the provisions of these sections are not directly applicable to CMRS providers, such as Vanguard, the rules the Commission adopts nevertheless will have a profound impact on all telecommunications

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2/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act").

3/ *See, e.g., Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21, Comments of Vanguard Cellular Systems, Inc. (filed March 13, 1996); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Comments of Vanguard Cellular Systems, Inc. (filed April 12, 1996); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Comments of Vanguard Cellular Systems, Inc. (filed April 19, 1996).

4/ Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers ("*CMRS Interconnection*"), CC Docket No. 95-185, Initial Comments of Vanguard Cellular Systems, Inc. (filed March 4, 1996) ("Vanguard CMRS Comments").

providers. Even those rules that do not directly affect CMRS providers will have significant indirect effects as they shape the behavior of incumbent LECs and new entrants alike.

For this reason, it is vital for the Commission to adopt rules that breathe life into the Congressional intent to foster competition in the local telephone marketplace.[5/] These comments focus on several areas where the Commission should make specific policy choices to encourage the growth of competition and implement Congressional intent as reflected in the 1996 Act and other laws.

As a fundamental requirement, the Commission must adopt and enforce specific national rules for implementing the substantive requirements of Section 251 and the cost standards and procedures of Section 252. Absent national rules, States and incumbent LECs would be able to thwart Congressional intent to encourage competition, and the development of competition would thereby be significantly delayed as disputes between incumbents and new entrants multiply. Clear national rules governing how LECs must meet their obligations under Section 251, on the other hand, would increase the likelihood that negotiations will succeed, enhance the prospects for competition, and reduce the need for States and the Commission to intervene to resolve disputes. Consequently, these comments offer substantive and procedural rules the Commission should adopt to ensure that incumbent LECs are unable to game the Section 251 process.

These comments also address issues of specific concern to CMRS providers. In particular, they demonstrate how impracticable it would be for the Commission to attempt to

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5/ *See* Sen. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (the "Conference Report") (1996 Act intended to bring advanced services "to all Americans by opening all telecommunications markets to competition"); *see also Notice* at ¶ 2 & n.5 (citing statements of Senator Pressler and Representative Fields).

shoehorn CMRS interconnection into a regulatory model adopted by Congress for landline carriers. There are significant legal and practical barriers to such an approach, which means that prompt action in the pending CMRS interconnection proceeding is vital. Similarly, the Commission should not impose LEC obligations on CMRS providers, either by altering the statutory definition of "local exchange carrier" or by otherwise modifying the obligations of CMRS providers. Indeed, there is no legal policy or other justification for changing the regulatory status of CMRS providers at this time.

II. THE COMMISSION MUST ADOPT UNIFORM NATIONAL RULES TO FORESTALL THE CREATION OF A PATCHWORK QUILT OF INCONSISTENT STATE REGULATORY MODELS. [*Notice* Part II(A) ¶¶ 25-36].

Key points:

- Because telecommunications services are increasingly multi-jurisdictional and service areas are expanding to be regional and national in scope, national interconnection rules are vital for hastening the development of competition.
- Preserving the status quo would allow a patchwork of existing state regulations to inhibit the development of competition.
- Regional and national carriers require predictable uniform national rules to execute business plans effectively and roll out advanced, wide-ranging telecommunications networks.
- Allowing parochial state regulatory frameworks to remain intact will raise the cost of regulatory compliance, restrict carriers' ability to serve their customers, and forestall the realization of robust competition.

Today's telecommunications networks operate without regard to state boundaries. For this reason, subjecting telecommunications carriers that increasingly provide wide-ranging services to the vicissitudes of state regulation would stifle the rapid deployment of seamless, nationwide wireless and landline networks. Moreover, to the extent that the 1996

Act requires the FCC to implement rules to promote local competition by facilitating the availability of interconnection and access to elements of incumbent LEC networks on a just, reasonable and nondiscriminatory basis, the Commission has a statutory obligation to adopt uniform national rules to fulfill this public interest purpose. Thus, the Commission should, as the *Notice* proposes, prescribe uniform national rules for implementing Sections 251 and 252 of the 1996 Act.

A. Telecommunications Has Increasingly Become a Multi-Jurisdictional Business.

Many factors have transformed telecommunications into a multi-jurisdictional industry. Most notable is the consolidation of companies seeking to realize synergies and economies of scale. Other factors and trends, however, are contributing toward making telecommunications more and more a regional and national business.

The telecommunications industry is experiencing accelerated concentration. Changes in technology and regulation, increased globalization, the desire for economies of scale, and the importance of offering bundled services are a few of the factors expected to drive increased consolidation in the telecommunications industry.[6/] Newly-formed competitors and combined entities in wireless and landline markets have created multi-jurisdictional operations that defy traditional intrastate-interstate jurisdictional boundaries. Moreover, as the *Notice* observes, interexchange carriers, competitive access providers and telecommunications

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6/ *See CompTel Members See Telecom Act Creating Opportunities, Contention*, TELECOMMUNICATIONS REPS., March 4, 1996, at 19, 21 (quoting Harry F. Hopper III, Senior Vice President and Principal, Columbia Capital Corp.).

ventures of cable operators are "expected to pursue different strategies that reflect their competitive advantages in the markets they seek to target."[7/]

In addition, many new entrants already are national or regional in scope. For example, national interexchange carriers are entering or plan to enter the local exchange market through local exchange affiliates or by means of joint ventures.[8/] National cable operators have announced plans to provide telephone services, and companies like Teleport Communications Group and MFS Communications have ambitious expansion plans well beyond markets they already serve.[9/] The Commission also has found that authorizing entry by public utility holding companies designated as exempt telecommunications carriers under Section 34 of the Public Utility Holding Company Act of 1935 could "significantly promote and accelerate competition in telecommunications services and deployment of advanced networks."[10/] These utilities often serve wide regions of the country. A failure to provide uniform rules could make entry by these prospective competitors problematic.

7/ *Notice* at ¶ 9.

8/ *See Analysts Question Possible MCI-AT&T Venture*, TELECOMMUNICATIONS REPS., Feb. 19, 1996, at 16.

9/ *See Notice* at ¶ 7 n.16; *MFS Plans to Expand U.S. Network to 85 Cities,* COMM. DAILY, May 8, 1996, at 6.

10/ *See, e.g., Application of Entergy Technology Company for Determination of Exempt Telecommunications Status under Section 34 of the Public Utility Holding Company Act of 1935, as amended by Section 103 of the Telecommunications Act of 1996*, File No. ETC-96-2, FCC 96-163, at ¶ 26 n.29 (released April 12, 1996) (citing *Application of CSW Communications, Inc. for Status as an Exempt Telecommunications Company under the Public Utility Holding Company Act of 1935, as Amended by Section 103 of the Telecommunications Act of 1996*, File No. ETC-96-1, FCC 96-152, at ¶ 3 (released April 4, 1996) (quoting S. Rep. No. 104-23, 104th Cong., 1st Sess., at 7 (1995)).

B. Telecommunications Service Areas Already Are or Are Becoming Regional and National in Scope.

Uniform national rules also are compelled by changes in the nature of telecommunications services and facilities. The structure of telecommunications networks has changed radically since the creation of the Commission in 1934, when state and local telephone networks were separate from interstate facilities. Today, regionalization is occurring in wireless and landline markets alike. Preserving a patchwork of potentially inconsistent state regulatory structures in today's market environment will only inhibit the evolution of wide-ranging telecommunications networks.

State-by-state oversight of interconnection between and among today's advanced network architectures will serve to stifle local competition. In the 1920s and 1930s, a clear delineation could be made between the structure of state and local telephone networks on the one hand and interstate networks on the other.[11/] Imposing an artificial state regulatory grid onto today's telecommunications networks, however, is an impractical and unworkable response in the context of today's marketplace.

Vanguard's cellular system in the Huntington-Ashland Metropolitan Statistical Area ("MSA") offers a good example of how service area boundaries have changed dramatically since the state-federal regulatory model of the 1930s was created. The Huntington-Ashland system serves customers in three states, West Virginia, Kentucky and Ohio, through one mobile telephone switching office ("MTSO"). The Huntington-Ashland system is thus subject to varying and sometimes inconsistent regulatory requirements from each of these states. For instance, Vanguard is required to submit annual reports, using a different format

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11/ *See, e.g., Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 51 S.Ct. 65 (1930).

for each state and on three different dates, in which it is supposed to provide state-specific information about revenues and customers for a system that operates as a unified whole. Vanguard also must comply with three different sets of tariffing requirements, one of which requires the filing of a rate sheet. Even construction of cell sites is subject to three regimes, ranging from no approval requirement in West Virginia to state commission approval of every cell site in Kentucky.

Steps toward regionalization and wide area calling plans have long been the trend in wireless markets. The increasing obsolescence of many traditional service area boundaries and service classifications as a result of technology-driven and advanced wireless telecommunications offerings signals the need for uniform national rules. Some industry observers foresee "the clustering of now separate capabilities — telephone, dispatch, paging, for example — into a single box for 'people on the move'."[12/] Wireless partnerships between or among interexchange carriers, cellular operators, enhanced specialized mobile radio ("ESMR") operators and Bell Operating Company ("BOC") cellular affiliates are just a few examples of the increasingly regionalized and wide-area aspects of today's telecommunications market.[13/] The Commission itself has acknowledged that local service

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12/ *See* John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of Their Competitive Effects*, 48 Fed. Com. L.J. 247, 249 n.4 (1996) (quoting *McCaw Buys $1.1 Billion in Stock from Nextel to Develop Enhanced 2-Way Radio*, COMM. DAILY, Apr. 6, 1996, at 4, 4-5 (plans to "combine radio dispatch, duplex telephone interconnect, alphanumeric short message service and future data capabilities into one device")). MCI recently has announced a similar service, bundling cellular, paging long distance, e-mail and single number service into a single product called "MCI One." *See MCI Bundles Cellular, Paging E-Mail and Number Into Single Product*, MOBILE COMMUNICATIONS REP., May 6, 1996, at 4.

13/ *See, e.g., Applications of Craig O. McCaw and AT&T*, 9 FCC Rcd 5836 (continued...)

areas of wireless carriers do not conform to traditional landline telephony service area boundaries such as local access and transport areas ("LATAs"), but "often include wide-area or regional calling, in response to customer demand."[14/] Congress has also recognized the multi-jurisdictional nature of wireless communications, stating that "mobile services . . . , by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[15/]

Landline telecommunications carriers also are shifting and expanding service area boundaries in a way that strains historical regulatory assumptions and supports the adoption of uniform national rules. The proposed $24 billion merger between SBC Communications, Inc. ("SBC") and Pacific Telesis Group ("PacTel") would combine the two RBOC's landline and wireless local telecommunications operations in California, Nevada, Arkansas, Kansas, Missouri, Oklahoma and Texas, and SBC's cellular operations in the Washington, D.C. region, with giant domestic and international long distance markets in Texas, California, Asia

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13/ (...continued)
(1994), *aff'd sub nom., SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995); *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Comm. Co.*, 77 Rad. Reg. 2d (P&F) 1487 (1995), *appl. for review pending*; *Applications of Motorola, Inc. for Consent To Assign 800 MHz Licenses to Nextel Communications, Inc.*, 10 FCC Rcd 7783 (1995), *recon. pending*; *Applications of Nextel Communications, Inc. for Transfer of Control of OneComm, N.A. and C-Call Corp.*, 10 FCC Rcd 3361 (1995), *recon. denied*, 10 FCC Rcd 10450 (1995);

14/ *See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Notice of Proposed Rule Making and Notice of Inquiry, 9 FCC Rcd 5408, 5438-9 (1994), *proceeding terminated on other grounds*, FCC 96-126 (released March 22, 1996).

15/ *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess., at 260, reprinted in 1993 U.S.C.C.A.N. 378, 587 ("Budget Act House Report").

and Latin America.[16/] The recently announced Bell Atlantic-NYNEX merger negotiations would aggregate the two RBOCs' landline and wireless local exchange networks, covering the entire Northeast and mid-Atlantic region with an estimated $14 billion long distance market stretching from Maine to Virginia.[17/] These and other transformations focus on the need to rethink and reshape regulatory policies to keep pace with marketplace realities.

C. Regional and National Carriers Need Uniformity If They Are to Compete Successfully in the Telecommunications Marketplace.

Adoption of uniform interconnection rules by the Commission is critical for stimulating competition in the telecommunications marketplace. Regulatory uniformity will facilitate sound business planning. Absent such uniformity, widely varying regulatory requirements will increase the costs of regulatory compliance and the difficulties of negotiations among carriers. Such regulatory variation also will restrict a carrier's ability to serve its customers by making it difficult to create packages of services that can be offered across a carrier's service area. Finally, granting the states too much flexibility in enforcing Section 252 of the 1996 Act is a prescription for delay, not for the development of robust competition as Congress intended.

In regulated businesses such as the telecommunications industry, predictability and uniformity in regulation is critical to effective business planning and the deployment of competitive facilities. Ceding implementation of the 1996 Act to the states will not result in

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16/ *See* Mike Mills, *Two "Baby Bells" Plan a $24 Billion Deal*, WASH. POST, Apr. 2, 1996, at A1; Jube Shiver, Jr., *SBC Growth Plans May Make Baby Bell Big Fast*, L.A. TIMES, Apr. 11, 1996, at B5.

17/ *See* Leslie Cauley and Steve Lipin, *Bell Atlantic and NYNEX Revive Talks on $22 Billion-Plus Merger*, WALL ST. J., Apr. 17, 1996, at A3.

an environment conducive to effective business planning because it will lead to the adoption of a series of varying state-specific requirements. Unique state requirements are likely to be administratively and financially burdensome, both individually and when taken together.

For example, the Pennsylvania Public Utility Commission ("Pennsylvania PUC") has established a mandatory interconnection "escrow" account pending resolution of its local competition proceeding.[18/] This requirement, which is unique to Pennsylvania, creates significant burdens for competitive telecommunications providers in that state. A principal drawback of the interim escrow arrangement, according to one company executive, is "the uncertainty of costs that [new entrants] will be blindly incurring."[19/] This requirement is unduly burdensome in and of itself. In combination with the wide variety of possible regulatory requirements that other states could adopt, the burden of comprehending, let alone complying with, state interconnection regimes could be crushing. In this context, and as the Commission previously has concluded, it is evident that the "regulatory process itself may have both direct and indirect anticompetitive results."[20/]

Applying varied state regulations to competitive telecommunications carriers would also increase the transaction costs of regulatory compliance and negotiations with other

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18/ The Pennsylvania PUC's order calls for incumbent LECs and competitors in the state to contribute equally to a reciprocal compensation escrow account until such time as the PUC establishes a permanent local call termination rate. Each carrier must make an initial $5,000 deposit and then put in $3,250 a month. *See* Herb Kirchoff, *Pa. PUC OKs Controversial Reciprocal Compensation Approach*, STATE TEL. REG. REP., December 14, 1995, 1.

19/ *See id.* at 2 (quoting Pati Ross, Teleport's Pennsylvania general manager).

20/ *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor*, CC Docket No. 79-252, 85 F.C.C.2d 1, 2-3 (1980) ("*Competitive Carrier I*").

carriers. Several states already require or are considering requiring new entrants to endure costly certification processes as a precondition of being allowed to engage incumbent LECs in interconnection negotiations under local competition rules.[21/] Similarly, absent uniform national rules, the Connecticut Department of Public Utility Control's ("Connecticut DPUC") decision flatly to prohibit incumbent LECs from negotiating bill and keep arrangements with wireless carriers will impose harmful costs upon wireless carriers attempting to negotiate interconnection arrangements in that state.[22/] Accordingly, the Commission must adopt uniform national rules to safeguard new entrants from incurring transactional costs due to burdensome state regulation.

Variations in regulatory requirements also will restrict a carrier's ability to serve its customers.[23/] Non-uniform state certification requirements and other obligations that affect

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21/ Some states have limited, or are considering limiting, interim call termination rate structures and bill and keep arrangements only to facilities-based landline competitors that have received certification as "competitive local exchange carriers." *See Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, R.95-04-043, I.95-04-044, Decision 95-12-056, at 13 (Calif. Pub. Util. Comm'n, adopted December 20, 1995) (sets hearing on issue whether LECs must offer cellular providers interim bill and keep provisions established for CLCs) ("*California PUC CLEC Certification Order*"); *DPUC Investigation Into Wireless Mutual Compensation Plans*, Docket No. 95-04-04, at 15 (Connecticut Dep't of Pub. Util. Control, adopted September 22, 1995) (expressly prohibits LECs from providing interim bill-and-keep arrangements made available to CLCs to wireless carriers) ("*Connecticut DPUC Order*"); *See also Application of MFS Intelenet of Pennsylvania, Inc.*, Docket Nos. A-310203F0002 *et seq.* (Pennsylvania Pub. Util. Comm'n., adopted September 27, 1995) ("*Pennsylvania PUC Order*").

22/ *See Connecticut DPUC Order.*

23/ The Commission's existing policy of deferring to the states on many important issues involving LEC-to-cellular interconnection has resulted in anticompetitive interconnection arrangements that favor incumbent LECs and hurt customers of new wireless entrants. *See* Initial Comments of Vanguard Cellular Systems, Inc., filed on March 4, 1996, in CC Docket No. 95-185, at 7-10.

the terms and conditions under which new entrants may provide service in a state will pose a variety of compliance challenges for regional and wide-area operations of telecommunications service providers. Finally, granting the states too much latitude is a prescription for delay, not for the development of robust competition that Congress intended.[24/]

III. THE COMMISSION SHOULD NOT IGNORE THE PROVISIONS OF SECTION 332 BY REQUIRING CMRS PROVIDERS TO OBTAIN INTERCONNECTION WITH OTHER CARRIERS THROUGH THE PROVISIONS OF SECTION 251(b). [*Notice* Part II(C)(2)(e)(2), ¶¶ 166-169].

Key points:

- LEC/CMRS interconnection is subject to exclusive federal jurisdiction pursuant to Section 332(c); this jurisdiction is not affected in any way by the 1996 Act.
- Applying Sections 251 and 252 to LEC/CMRS interconnection would be inconsistent with the Commission's exclusive jurisdiction over CMRS because these provisions rely on state commissions to resolve interconnection issues.
- The Commission quickly should complete the *CMRS Interconnection* proceeding and mandate a bill and keep mechanism for LEC/CMRS interconnection

In the *Notice*, the Commission asks whether LEC/CMRS interconnection is governed by the provisions of Section 251 and if so, what relationship exists between Section 251 and Section 332.[25/] As Vanguard demonstrated in comments filed in the *CMRS Interconnection*

24/ The Commission correctly observes in the *Notice* that "[l]ingering disputes over the terms and conditions of interconnection due to confusion or ambiguity create *the potential for incumbent LECs to delay entry*." *Notice* at ¶ 50. Delay also can occur because of a state's failure to act. Indeed, an application filed by MFS Communications Co. to offer local exchange and private line services has been pending at the District of Columbia Public Service Commission since 1989. *See MFS Seeks Preemption of D.C. Commission on Local Service Certificate*, STATE & LOCAL COMM. REP., May 3, 1996, at 1.

25/ *Notice* at ¶¶ 166-69.

proceeding, the 1993 Budget Act[26] federalized the regulation of CMRS, including regulation of interconnection between LECs and CMRS providers, and nothing in the 1996 Act alters the Commission's exclusive jurisdiction over LEC/CMRS interconnection.[27] Therefore, LEC/CMRS interconnection should not be subject to the provisions of Sections 251 and 252 of the 1996 Act. Rather, the Commission should promptly complete its *CMRS Interconnection* proceeding and require bill and keep reciprocal compensation arrangements between LECs and CMRS providers.

A. It Is Inappropriate to Apply Sections 251(b) and 252 to CMRS Providers.

Vanguard's comments in the *CMRS Interconnection* proceeding demonstrated that the 1993 Budget Act federalized the regulation of LEC/CMRS interconnection.[28] Under Section 332(c)(1)(B), the Commission has authority to order all common carriers to establish physical interconnection with CMRS providers pursuant to Section 201 of the 1934 Act.[29] Thus, while Section 2(b) generally prohibits Commission regulation of intrastate matters, Section 332(c) created an exception for LEC/CMRS interconnection by expanding the Commission's authority under Section 201.

Nothing in the 1996 Act alters the Commission's exclusive jurisdiction over LEC/CMRS interconnection. The 1996 Act did not delete or amend Section 332(c) or

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26/ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §§ 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) ("1993 Budget Act").

27/ Vanguard CMRS Comments at 23-26.

28/ *Id.*

29/ 47 U.S.C. § 332(c)(1)(B).

Section 201 in any way. Indeed, Section 251(i) provides that nothing in Section 251 "shall be construed to limit or otherwise affect the Commission's authority under Section 201."[30/] Accordingly, the authority over interconnection matters granted to the Commission under Section 251 only amplifies the power already possessed by the Commission. Because the 1993 Budget Act expanded the scope of Section 201 to give the Commission exclusive jurisdiction over LEC/CMRS interconnection, Section 251 in no way limits or affects this pre-existing authority.

Given the Commission's statutory authority prior to the 1996 Act, it is apparent that application of the provisions of Sections 251 and 252 to LEC/CMRS interconnection would be inconsistent with Congressional intent, expressed in Section 332 and confirmed in Section 251(i), that the Commission retain exclusive jurisdiction over CMRS matters. Indeed, applying the interconnection provisions of the 1996 Act to LEC/CMRS interconnection would produce anomalous results because of the different statutory schemes. For example, while Section 332 covers both the LEC and the CMRS sides of a LEC/CMRS interconnection arrangement, Section 251 applies only to LECs. Moreover, the requirements of Section 251 can be waived as to rural LECs, while Section 332 plainly contemplates that the Commission may order any common carrier to provide interconnection to a CMRS provider.[31/]

Furthermore, while Section 252 contemplates state resolution of interconnection issues, including rates, Section 332(c)(3) explicitly prohibits states from regulating CMRS

30/ 47 U.S.C. § 251(i).

31/ *Compare* 47 U.S.C. § 251(f) *with* 47 U.S.C. § 332(c)(1). *See also infra* Part VII.

rates.[32] In adopting Section 332 Congress plainly intended for the Commission to regulate LEC/CMRS interconnection. Consequently, the interconnection provisions of the 1996 Act cannot reasonably be construed to apply to CMRS providers because such a reading would frustrate the intent of the 1993 Budget Act and return CMRS to the unwieldy dual regulatory regime that prevailed before Congress adopted the 1993 Budget Act.

Not only does the 1996 Act require the Commission to regulate LEC/CMRS interconnection under Section 332, rather than under Sections 251 and 252, but there also are important public policy reasons to support such a regulatory regime. The experience of cellular companies plainly demonstrates that the one-sided brand of "negotiation" with incumbent LECs that has prevailed to date almost certainly will not produce pro-competitive results. As Vanguard demonstrated in its comments in the *CMRS Interconnection* proceeding, it is required in all but one of its markets to pay for interconnection without receiving any compensation from the incumbent LEC in return.[33] This result would not occur in free negotiations between entities with equal bargaining power. Moreover, unlike other carriers that are subject to competitive pressures, incumbent LECs historically have been able to avoid engaging in meaningful negotiations with CMRS providers because they have the market power to dictate the terms of interconnection.[34]

Unless the FCC intervenes, early evidence indicates that future LEC/CMRS negotiations will be no more fruitful and that this historic pattern of abuse and discrimination

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32/ 47 U.S.C. § 332(c)(3).

33/ Vanguard CMRS Comments at 7.

34/ *Id.* at 9-10 and Exhibit A. A copy of the declaration contained in that exhibit is appended to these comments as Exhibit 1.

will continue. For example, the model interconnection agreement recently released by U S West excludes CMRS providers.[35/] Instead, U S West states that it will negotiate CMRS interconnection agreements separately and that it believes its existing cellular interconnection agreements are satisfactory.[36/] As Vanguard and others already have demonstrated, these agreements may be satisfactory to the incumbent LECs, but they do nothing to promote the competition between LECs and CMRS providers that Congress and the Commission intended.

This history of discriminatory treatment and the tremendous potential for discrimination in the future strongly demonstrate the need for national rules governing LEC/CMRS interconnection. Indeed, national rules are even more important for CMRS providers than for landline services because CMRS providers already offer service on a regional and national level. Unlike landline services, which originally developed in conformity with state boundaries and traditionally have been heavily regulated at the state level, wireless services have been built almost from the start around clustered, multi-jurisdictional markets and, following the 1993 Budget Act, have been subject to diminished state regulation. Thus, even more than landline competitors, CMRS providers require national interconnection standards, not a set of open-ended state-by-state negotiations and

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35/ *See* U S West Agreement for Local Wireline Network Interconnection and Service Resale, Section IV(A) (rel. March 29, 1996). The agreement also contains other provisions that make it unreasonable, including a prohibition on seeking certain changes in laws or regulation, and it fails to meet the basic requirements of Section 251(b)(5) because it is not reciprocal.

36/ *See* Letter from Cyndie Eby, Executive Director - Federal Regulatory, U S West, Inc. to William F. Caton, Secretary, Federal Communications Commission, CC Docket 95-185 (filed May 7, 1996) ("U S West CMRS Interconnection Letter").

arbitrations. A regime based on state regulation may result in duplicative burdens on CMRS providers and may not impose sufficient interconnection obligations on LECs. Accordingly, it is imperative that the Commission adopt a uniform set of LEC/CMRS interconnection rules pursuant to Section 332.

B. Prompt Commission Action on the CMRS Interconnection Proceeding Is Vital.

Vanguard and other CMRS providers have demonstrated the one-sided nature of existing LEC/CMRS interconnection arrangements and the tremendous excess revenue that LECs have generated from these agreements. As noted above, in all but one of its markets, Vanguard pays the incumbent LEC to terminate calls, but receives no compensation when it terminates calls originating on the LEC's network.[37/] Moreover, the rates paid by Vanguard for call termination are far in excess of the cost to the LEC of terminating the call.[38/]

CMRS providers have no hope of offering a competitive alternative to landline local exchange service as long as these onerous interconnection arrangements remain in effect Because of the differences between the CMRS and landline markets and the different statutory schemes governing each, the Commission's actions in this proceeding should in no way constrain the timing of its decision in the *CMRS Interconnection* proceeding or the outcome of that decision. Rather than further delaying the adoption of pro-competitive interconnection rules for LEC/CMRS interconnection by awaiting completion of this proceeding, the best way for the Commission to promote robust competition is to quickly

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37/ Vanguard CMRS Comments at 7.

38/ *Id.* at 11-12 (average termination charge paid by Vanguard is fifteen times the estimated incremental cost of termination).

complete its CMRS interconnection proceeding and mandate bill and keep reciprocal compensation arrangements for LEC/CMRS interconnection.

IV. CMRS PROVIDERS SHOULD NOT BE SUBJECTED TO THE REQUIREMENTS IMPOSED ON LECS BY THE 1996 ACT. [*Notice* Part II(C), ¶¶ 195-197].

Key points:

- The Commission should maintain the regulatory distinctions between CMRS providers and LECs established by the 1996 Act, as CMRS providers do not provide LEC services.

- Any Commission decision to reclassify CMRS providers as LECs should be based on the requirements of Section 332(c)(3) of the Communications Act. Use of this standard serves the principle of regulatory parity and is consistent with the Congressional determination that CMRS providers could be, but are not yet, LECs.

- The Commission should refrain from applying the resale obligations of incumbent LECs to CMRS providers, as a wholesale pricing requirement is unnecessary to prevent anticompetitive conduct by CMRS providers. Moreover, vigorous competition in the CMRS resale market presently exists; this competition will increase in the near-term with the introduction of new Personal Communications Services.

The 1996 Act imposes many obligations on LECs to promote competition in the market for local exchange services. The scope of these obligations varies depending on whether the LEC is an incumbent or a new entrant. *Compare* 47 U.S.C. § 251(b) *with* 47 U.S.C. § 251(c). While expressly excluding CMRS providers from the obligations applicable to incumbent LECs and LECs generally, the 1996 Act reserves discretion for the Commission to subject CMRS providers to LEC obligations in the future. No reason exists to eliminate the regulatory distinction between CMRS providers and LECs at the present time. Consequently, the Commission should decline to subject CMRS providers to LEC obligations under the 1996 Act in this proceeding. The Commission also should not modify existing cellular resale obligations because there is no need to do so.

A. The Commission Should Not Include CMRS Providers Within the Definition of LECs at this Time.

New Section 251(b) of the Communications Act imposes specific obligations on all LECs related to resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation for transport and termination of traffic.[39/] The scope of the application of these obligations is determined by the 1996 Act, which defines a local exchange carrier as "any person that is engaged in the provision of telephone exchange service or exchange access . . ."[40/] However, the 1996 Act also establishes that the obligations contained in Section 251(b) do not apply to persons "engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term."[41/] While the Commission has the power to make an affirmative finding that CMRS providers should be included in the 1996 Act's definition of a LEC, it should not do so at this time.

Congress' understanding that CMRS providers may someday act as LECs is demonstrated by the 1996 Act's reservation of authority for the Commission to classify CMRS providers as LECs in the future. It is clear, however, that Congress believed that CMRS providers did not yet act as LECs when Congress passed the 1996 Act because it expressly excluded CMRS providers from the definition of a LEC. No reason exists for the Commission to overturn that recent Congressional determination in the present proceeding.

39/ 47 U.S.C. § 251(b)(1)-(5).

40/ 47 U.S.C. § 153(a)(44).

41/ *Id.*